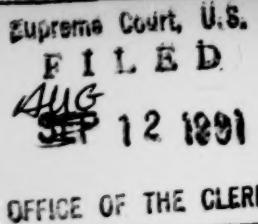


91-822

No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

TERM, 1991

SHARON J. KRANK,

Petitioner,

v.

FULTON BANK,

Respondent

PETITIONER FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT
(CASE NO. 90-1163)

Sharon J. Krank, Pro Se
6006 Greenbelt Rd., #166
Greenbelt, MD 20770
(301) 345-6007

QUESTIONS PRESENTED

Did the trial judge's failure to properly instruct the jury as to the only substantive defense of Respondent FULTON BANK invalidate the decision of the jury and give rise to the issuance of a Writ of Certiorari?

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**LIST OF ALL PARTIES TO THE PROCEEDING
REQUIRED BY SUPREME COURT RULES**

1. **FULTON BANK**
Lancaster, PA 17601
2. **F. MURRAY BRYAN, ESQ.**
100 Pine Street,
P.O. Box 1166
Harrisburg, PA 17108
3. **DAVID E. LEHMAN, ESQ.**
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108



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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, 1991

SHARON J. KRANK,

Petitioner,
v.

FULTON BANK,

Respondent

PETITIONER FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, SHARON J. KRANK
respectfully prays that a Writ of
Certiorari issue to review the judgment of
the United States Court of Appeals for the
Third Circuit entered in the above matter
on September 25, 1990 (Petition for Review
denied May 14, 1991).

OPINIONS BELOW

No opinion was issued by the Third Circuit Court of Appeals, but the Order affirming the Decision of the District Court is reproduced in the Appendix A. The Trial Court's judgment and order, filed January 16, 1991, is reproduced in Appendix B.

JURISDICTION

The Petitioner seeks review of the judgment of the Court of Appeals entered on September 25, 1991. By Order dated May 14, 1991, the Third Circuit denied my Petition for Rehearing (Appendix B). This Court's jurisdiction is valid under 28 U.S.C. § 1251(1).

STATUTES

Pennsylvania 21 P.S. § 681 requires mortgagee to mark paid mortgages satisfied within 45 days of payment.

STATEMENT OF THE CASE

A. Nature of the Case

SHARON J. KRANK brought suit in the United States District Court for the Eastern District of Pennsylvania in April 1989 alleging that Defendant FULTON BANK by wrongfully refusing to satisfy a lien against an office building of which she was record owner, resulted in her loss of that property. The jurisdiction involved was that of Diversity of Citizenship.

B. Evidence

The property in question was located at 1574 Lititz Pike, Lancaster, PA. Plaintiff purchased the property from one Edythe C. Herr. Settlement was held on or about August 31, 1983.

Prior to settlement Respondent FULTON BANK was contacted as to what amount of money would be necessary to release the property from certain liens against the

property that a title search had revealed were held by FULTON BANK and against Edythe C. Herr.

The "payoff" figure was obtained from Respondent FULTON BANK and on the day of settlement a check in the amount requested by Respondent in the amount of \$76,488.44 was drawn in favor of and delivered to said FULTON BANK. The check, in addition, carried the inscription "IN FULL SATISFACTION - 1574 LITITZ PIKE."

In answering Petitioner's Complaint, as well as at trial, Respondent FULTON BANK admitted the following:

1. That they had furnished to Plaintiff SHARON J. KRANK a payoff figure of \$76,488.44.
2. That they had received and cashed a check in that amount inscribed with the inscription "IN FULL SATISFACTION -1574 LITITZ PIKE."



3. That they had accepted the releases for recording and drawn their own check in the amount of \$13.50 to the Recorder of Deeds so that the record might be officially cleared.

In addition, during the course of the proceedings of the trial Petitioner obtained internal records from Respondent FULTON BANK showing that their own internal loan record card was marked "PAID IN FULL" on September 1, 1983--the very day after settlement on the property.

Despite all of this Respondent FULTON BANK never did clear the public records and as a direct result of this wrongful act, Petitioner SHARON J. KRANK lost her property.

Pennsylvania law clearly sets forth that if full payment is made to a mortgagee, the mortgagee (in this case Respondent FULTON BANK) must (emphasis

added) satisfy the docket within 45 days. (21 P.S. § 681). It is further clear that under Pennsylvania law that a Mortgagor can bring suit for damages when the law is not complied with. The very Federal Court involved in this case has so held Bennett Levin and Linda Levin v. K.B. Weissman v. Harry Rutenberg, et al, 594 F.Supp (1984).

The Statute is fully mandatory and the Sole (emphasis added) responsibility for satisfaction rests with the mortgagee.

The emphasis is added here because at trial the Respondent FULTON BANK inferred that it would have settled the public records had Petitioner supplied additional paperwork. Petitioner had supplied the proper paperwork, but the law, in any event, is clear that it was Respondent's sole responsibility to satisfy the docket (once again, emphasis added).

Now since the Respondent FULTON BANK



admitted getting paid and the law clearly says that once it is paid it must satisfy the docket, why are we here?

The Respondent FULTON BANK in its answer and during the trial raised only one defense--a defense known as the "dragnet clause." In laymen's terms the "Dragnet Clause" means that if a borrower owes money on more than one property, the lender can refuse to allow a borrower to sell a property free and clear if that borrower still owes the lender money on other properties.

In the case at hand the person Petitioner SHARON J. KRANK bought the property from, Edythe C. Herr, who did owe other monies to Respondent FULTON BANK. The Respondent Bank, therefore, invoked in its Answer and at trial the "Dragnet Clause" as its only material defense.

Petitioner realizes that the merits of

the Dragnet Clause defense are not a proper issue for appeal in this case. However, the Dragnet Clause in and of itself is reason for granting the WRIT.

The Trial Judge sat and listened to the evidence of "payment in full" to Respondent FULTON BANK, admitted to by Respondent FULTON BANK. He then listened to witness after witness presented by the Bank testifying almost exclusively on the question of the Dragnet Clause. Yet in his jury instructions (excerpted in Appendix "D"), the Trial Judge told the jury

"the dragnet clause really has nothing to do with this . . ." [the case].

The fatality of these remarks is further strengthened by the fact that during the course of the trial he made repeated comments to the jury reflecting his "expertise in real estate law."

In the more standard portion of the instructions to the jury the judge went on to say (excerpted in Exhibit E),

"So you're the judges of the facts, I'm the judge of the law, you're obligated to follow the law as I state it to it. . ."

Petitioner believes these jury instructions taken together were substantive judicial error. The jury was told to ignore the only issue raised as a defense in this case and, therefore, by virtue of the Trial Judge's instructions, were not allowed to "judge the facts" as they had been directed.

CONCLUSION

ACCORDINGLY, a Writ of Certiorari should issue to review the judgment.

Respectfully submitted,



Sharon J. Krank, Pro Se
6006 Greenbelt Road, #166
Greenbelt, MD 20770

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1163

KRANK, SHARON J.,
KRANK, DONALD F.,
Appellants

v.

BARBER, JOHN T. ESQ.,
BARLEY, SNYDER, COOPER & BARBER,
FULTON BANK

Appeal from the United States District
Court for the Eastern District of
Pennsylvania
(D.C. Civil Action No. 89-02871)
District Judge: Hon. Edward N. Cahn

Submitted Under Third Circuit Rules 12(6)
July 24, 1990

Before: HIGGINBOTHAM, Chief Judge,
MANSMANN and COWEN, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. Leon Higginbotham
Chief Judge

Attest:

/s/ Sally Mrvos
Clerk

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

SHARON J. KRANK and)
DONALD KRANK,)
Plaintiffs)
v.) CIVIL ACTION
FULTON BANK,) NO. 89-2871
Defendant)

O R D E R

AND NOW, this 11th day of January,
1990, IT IS ORDERED as follows:

1. The motion of Fulton Bank pursuant to Federal Rule of Civil Procedure 50(a) for a directed verdict against Donald Krank is GRANTED.
2. Judgment is hereby ENTERED in favor of Defendant, Fulton Bank, and against Plaintiff, Donald Krank.
3. In accordance with the answers of the jury to the interrogatories propounded



to them, judgment is ENTERED in favor of defendant, Fulton Bank, and against plaintiff, Sharon J. Krank.

4. The Clerk is directed to close the docket of the within case for statistical purposes.

BY THE COURT;

/s/ Edward N. Cahn, J.

entered 1/16/90



APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 90-1163

KRANK, SHARON J.,
KRANK, DONALD F.,
Appellants

v.

BARBER, JOHN T. ESQ.,
BARLEY, SNYDER, COOPER & BARBER,
FULTON BANK

(D.C. Civil Action No. 89-02871)

ORDER SUR PETITION FOR PANEL REHEARING

Present: MANSMANN, COWEN and
HIGGINBOTHAM, Circuit Judges.

The petition for rehearing filed by
Sharon Krank, in the above-entitled case
having been submitted to the judges who



participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.
Circuit Judge

Dated: May 14, 1991

*Honorable A. Leon Higginbotham, Jr., was Chief Judge at the time the original judgment order was filed on October 17, 1990, having assumed Senior Judge status on February 1, 1991.

APPENDIX D

Judge's Charge Page 36

that is January 11th, 2:30, and doesn't tell me how you stand on any particular issue in the case. You should not ask me a question of a factual nature. You should not ask me, should we believe Mrs. Herr. That's strictly for you to determine. But suppose you don't understand drag -- you want to further -- the dragnet clause really has nothing to do with this so that's why I didn't cover it. If you want to know about the dragnet clause, I'll explain it to you. If you want to know more about releases and satisfactions, I'll explain it to you. If you want to know about burden of proof, I'll explain it to you. If you're confused about how you determine credibility, I'll explain that to you.



But I can't answer any factual inquiries.

Do you -- either of you wish to see me in regard to exceptions to the charge?

MR. BRYAN: Your Honor, I take it that . . .

THE COURT: Well, I'll see you at sidebar if you do.

MR. BRYAN: Oh, all right. Thank you.

MR. KRANK: I did also, Your Honor.

THE COURT: Okay.

(Sidebar begins).

THE COURT: Would you stand over here, Mr. Krank? We'll take you first. Do you have any exceptions?

MR. KRANK: I don't know if this was covered yesterday. I presented to you a memorandum of law, which you

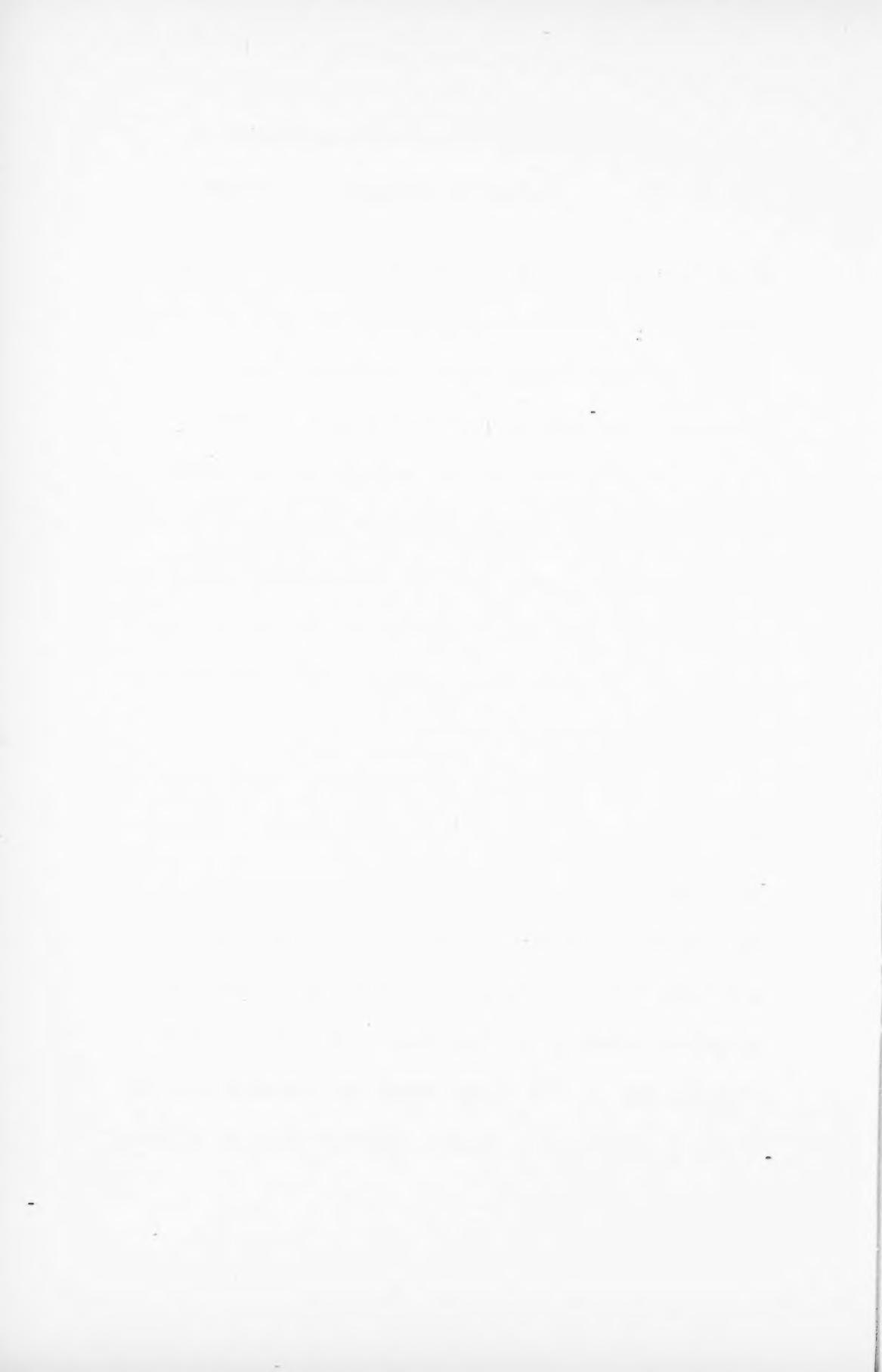


APPENDIX E

Judge's Charge Page 8

will tell you what the law is and you will apply the law as I state it to you to the facts as you find them, and by that process, arrive at your verdict. That still is the way we're going to do this. So you're the judges of the facts, I'm the judge of the law, you're obligated to follow the law as I state it to it -- as I state it to you, and apply that law to the facts as you find them.

You should also understand that you are the final judges of the facts. What you say about the facts can never be disturbed. What I say about the law is subject to having an exception taken at sidebar when I'm finished, and if I don't change my -- if they take an exception to what I say and I don't change it, a higher



court can reverse me. But on your factual decisions, you cannot be reversed. You dec -- your factual decisions will be final and binding on these parties.

Now you should understand that it is your recollection of the evidence that controls. The attorneys as -- are permitted to tell you what they think the evidence is in their opening statements, and they're permitted to refresh your memories as to what the evidence was in their closing arguments, and I'm permitted to refer to what I think the evidence was in my instructions to you. But your collective recollection of the evidence controls in the sense what did a person say, and was that person being truthful. That is strictly your determination. And if your collective

DEC 17 1991

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

SHARON J. KRANK,

Petitioner,

vs.

FULTON BANK,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. YOUNG, JR.

Counsel of Record

DAVID E. LEHMAN

MCNEES, WALLACE & NURICK

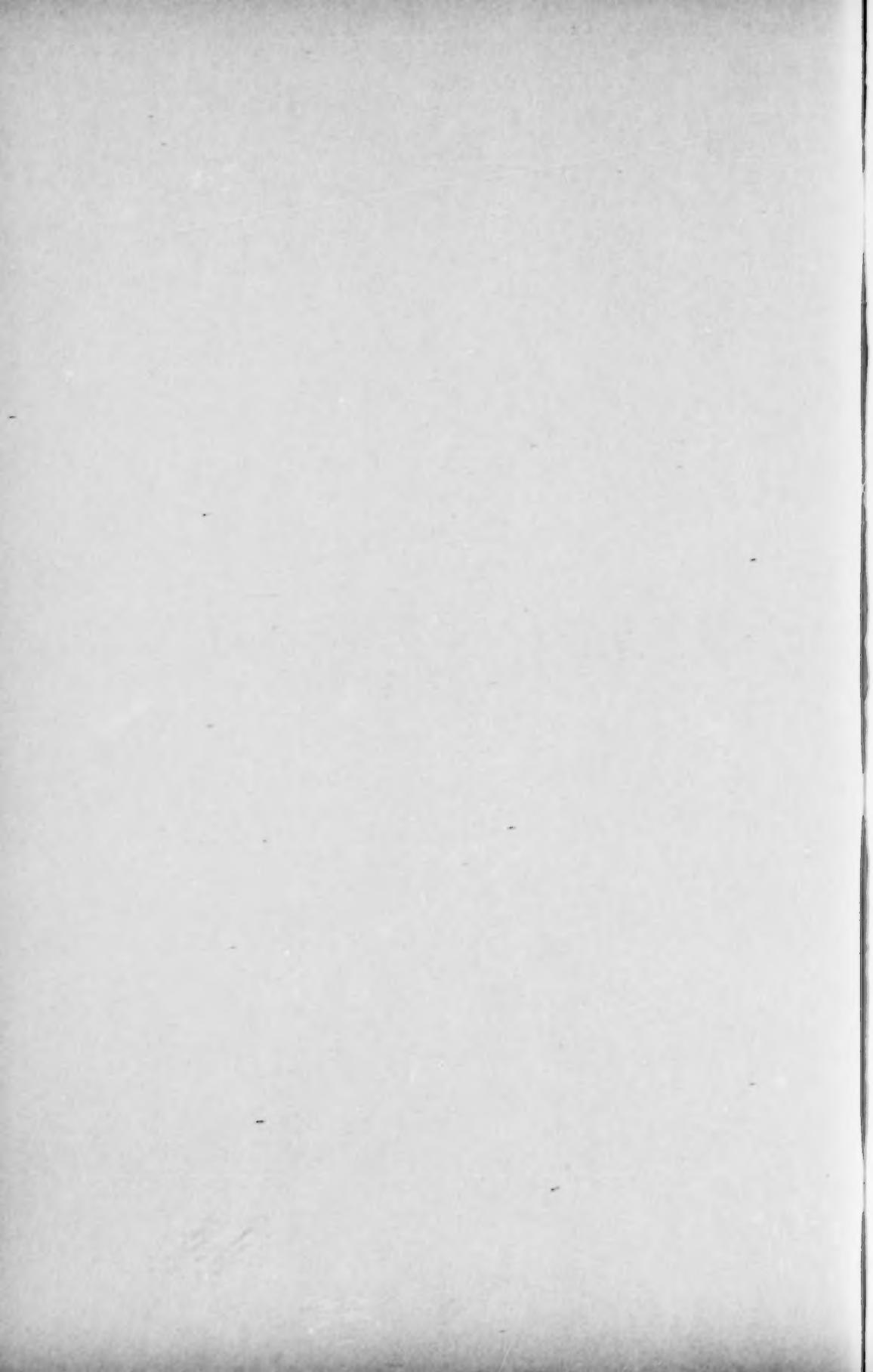
Attorneys for Respondent

100 Pine Street

P.O. Box 1166

Harrisburg, Pennsylvania 17108-1166

(717) 232-8000



QUESTION PRESENTED

Was the alleged failure of the trial court to properly instruct the jury waived by petitioner's failure to submit a point for charge or to take exception or request a supplemental charge at trial?

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No. 91-822

In The

Supreme Court of the United States

October Term, 1991

SHARON J. KRANK,

Petitioner,

vs.

FULTON BANK,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF JURISDICTION

The following orders were entered by the courts below:

Order of the United States District Court for the Eastern District of Pennsylvania, January 16, 1990 (Appendix A, 1a).

Judgment Order of the United States Court of Appeals for the Third Circuit, September 25, 1990 (Appendix B, 3a).

Order Sur Petition for Panel Rehearing, May 14, 1991 (Appendix C, 5a).

COUNTERSTATEMENT OF THE CASE

During a period of more than six years preceding August of 1983, Edythe C. Herr, entered into commercial borrowings from Fulton Bank to finance acquisition and development of various parcels of real estate. These activities included a residential development tract, an office building and a residence. In June 1977, Ms. Herr executed a mortgage note and mortgage in favor of Fulton Bank, which instruments provided, among other things, security for present and future debts of Herr. The mortgage secured both her office building and her residence properties.

Pursuant to an overall lending and security plan, the Bank made five loans to Ms. Herr between 1978 and 1981, in amounts of approximately \$547,000. Numerous notes and collateral security documents were provided to Fulton Bank in connection with those loan transactions.

By 1981, Ms. Herr was delinquent in her borrowings from Fulton Bank. In November 1981, she communicated with the Bank concerning a proposed sale of her office building to Donald Krank¹ and/or Sharon Krank.

1. Donald Krank, formerly a practicing attorney, was one of the plaintiffs in the District Court proceeding and served as counsel for himself and his wife at trial. His claim was dismissed upon motion for directed verdict. He did not appeal and has no record role in connection with either the Third Circuit proceedings or the current petition for certiorari.

The Bank advised Ms. Herr in writing on November 23, 1981 that Fulton Bank would agree, upon receipt of payment of the proceeds from sale of the office building to "execute a Release of Mortgage on the office leaving the mortgage to cover your personal residence only."

In September 1983, there were communications between Herr and representatives of the Bank concerning the payoff balance related to the mortgage note of June 24, 1977. Certain checks were delivered by Herr to the Bank in connection with the payoff of that particular loan. There was disputed testimony at trial concerning discussions about preparation and delivery of forms for the Bank to release the subject property from the mortgage lien. The Bank's witnesses testified that Ms. Herr offered to bring releases into the Bank, that the practice in Lancaster County was for the release of a property from lien of mortgage to be prepared by the settlement agent or obligor (Donald Krank and/or Edythe Herr). Releases were provided to the Bank, were executed by the Bank on October 3, 1983 and delivered back to and received by Ms. Herr.

The dispute in this case concerned whether or not the Bank had promised to *satisfy* the accompanying mortgage, rather than merely release the property from the lien of mortgage. The Bank maintained that it desired to keep the mortgage in place and in effect to provide whatever security it might with respect to other property owned by Edythe Herr and other obligations of Herr's which remain unpaid. As of September 1983, after taking into account the payment which was made, there were still delinquent balances due from Ms. Herr's company, for which she was a personal guarantor, totalling \$432,280.

The underlying theory of claim against the Bank and the basis of the Bank's alleged liability was not clearly articulated by Kranks. Although the testimony was confusing, it appeared that the basis

of the claims by both Mr. and Mrs. Krank were that the Bank had promised to satisfy (or in the alternative to take steps affirmatively to release the lien of) the mortgage in question.

Trial Judge Edward N. Cahn determined that the only theory presented for decision by the jury was a contract theory, whether the arrangement between Krank/Herr and Fulton Bank was a contract to satisfy or to release the mortgage in question, and, if so, whether the Bank breached that contract. Accordingly, the trial judge submitted interrogatories to the jury as follows:

1. Has the Plaintiff, Sharon J. Krank, proved by a preponderance of the evidence that the Defendants, Fulton Bank wrongfully refused to satisfy the \$140,000 mortgage on the premises at 1574 Lititz Pike?
2. Has the Plaintiff, Sharon J. Krank, proved by a preponderance of the evidence that the Defendants, Fulton Bank, wrongfully refused to release the lien of Mortgage on the premises at 1574 Lititz Pike?

The trial court carefully instructed the jury on the contractual theory of the case and the relationship of that theory to the testimony it had heard. The parties were given opportunity to comment on the proposed interrogatories and on the instructions, before the jury was sent to deliberate. At no time did appellants object to the submission of the case on the contract theory or to the interrogatories to be submitted for jury decision. The jury's answers to both interrogatories 1 and 2 was "No."

The term "dragnet clause" was used a number of times during testimony and was the subject of some comment in the course of argument by both parties. The trial judge correctly pointed

out to the jury, however, that determination of the contract questions presented to them did not involve an application of the dragnet clause.

SUMMARY OF ARGUMENT

No basis exists for this Court to grant petitioner's petition for a writ of certiorari. Petitioner has failed to identify a single error of law in the decision of the court below. To the contrary, it was petitioner's failure to raise objection at trial which acts as a waiver and precludes any further review of the propriety of jury instructions.

REASONS FOR DENYING THE WRIT

The Kranks' claim was well and fairly tried on the basis upon which it was submitted. A simple contract question on which there was disputed testimony was framed for the jury's determination.

Petitioner has identified no error of law in the instructions which were given by the court. On the contrary, the excerpts furnished from the court's charge are straightforward, innocuous statements of law and general instruction. The only issue framed in the case and argued to either this Court or to the court below is the argued failure of the trial court to give proper instructions to the jury. However, the matter now assigned as trial error was not the subject of any point for charge, nor of any request for supplemental instruction. No objection was made by petitioner at the conclusion of the instructions, before the jury retired to consider its verdict. Such failures are well-recognized to constitute a waiver of the right to challenge and raise the matter on appeal. Federal Rule of Civil Procedure 51 is clear:

No party may assign as error the giving or
the failure to give an instruction unless that party

objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

To the same effect, the cases in the Third Circuit hold that failure to raise an objection relating to trial instructions constitutes a waiver. *See Fisher v. Volz*, 496 F.2d 333, 348 (3d Cir. 1974); *Scott v. Plante*, 641 F.2d 117, 128 (3d Cir. 1981).

Finally, respondent suggests that this is not an extreme situation of fundamental or highly prejudicial error where a "gross miscarriage of justice" might obtain through the application of the doctrine of waiver recited above. *See Callwood v. Callwood*, 233 F.2d 784, 788 (3d Cir. 1956), 6a J. Moore, *Moore's Federal Practice*, ¶ 59.08[2] at 59-88-89 (2d Ed. 1989); 5A J. Moore, *Moore's Federal Practice*, ¶ 51.04 at 51-14-20.

All of these points were considered by the court below. No basis exists on which this Court should review the disposition made by the Court of Appeals for the Third Circuit.

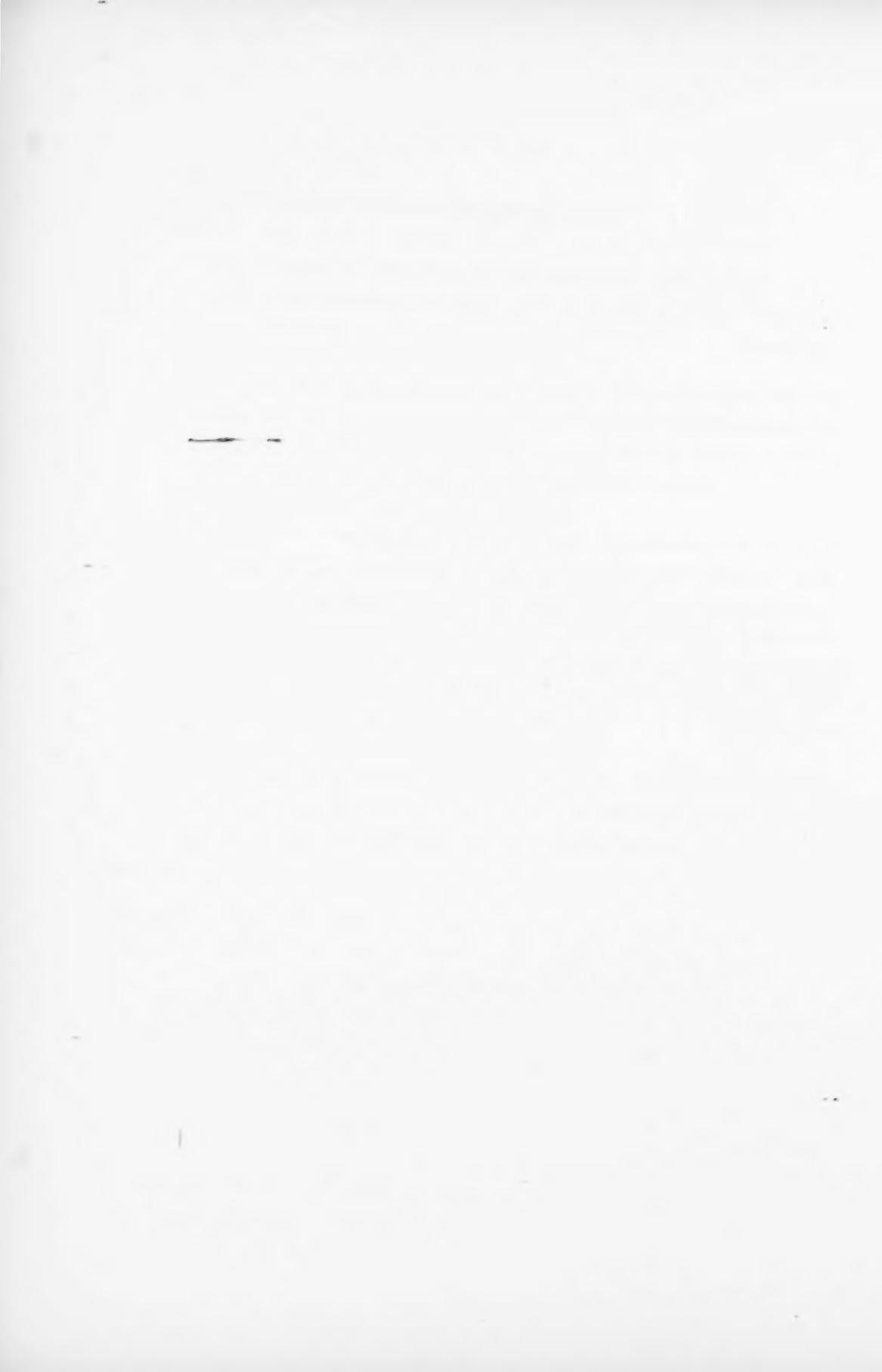
CONCLUSION

For the foregoing reasons, respondent Fulton Bank respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM M. YOUNG, JR.
Counsel of Record
DAVID E. LEHMAN
MCNEES, WALLACE & NURICK
Attorneys for Respondent

Dated: December 13, 1991



**APPENDIX A — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA FILED JANUARY 16, 1990**

CIVIL ACTION NO. 89-2871

SHARON J. KRANK and DONALD KRANK

Plaintiffs

v.

FULTON BANK,

Defendant

ORDER

AND NOW, this 11th day of January, 1990, IT IS ORDERED as follows:

1. The motion of Fulton Bank pursuant to Federal Rule of Civil Procedure 50(a) for a directed verdict against Donald Krank is GRANTED.
2. Judgment is hereby ENTERED in favor of defendant, Fulton Bank, and against plaintiff, Donald Krank.
3. In accordance with the answers of the jury to the interrogatories propounded to them, judgment is ENTERED in favor of defendant, Fulton Bank, and against plaintiff, Sharon J. Krank.
4. The Clerk is directed to close the docket of the within case for statistical purposes.

Appendix A

BY THE COURT:

s/ Edward N. Cahn
Edward N. Cahn, J.

**APPENDIX B — JUDGMENT ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
DATED SEPTEMBER 25, 1990**

No. 90-1163

KRANK, SHARON, J.,
KRANK, DONALD F.,

Appellants

v.

BARBER, JOHN T. ESQ.,
BARLEY, SNYDER, COOPER & BARBER,
FULTON BANK

Appeal from the United States District Court for the Eastern
District of Pennsylvania

(D.C. Civil Action No. 89-02871)

District Judge: Hon. Edward N. Cahn

Submitted Under Third Circuit Rule 12(6)
July 24, 1990

Before: HIGGINBOTHAM, *Chief Judge*, MANSMANN and
COWEN, *Circuit Judges*.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the
district court be and is hereby **AFFIRMED**.

Appendix B

Costs taxed against appellant.

BY THE COURT,

s/ A. Leon Higginbotham
Chief Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

**APPENDIX C — ORDER SUR PETITION FOR PANEL
REHEARING DATED MAY 14, 1991**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 90-1163

**KRANK, SHARON, J.,
KRANK, DONALD F.,**

Appellants

v.

**BARBER, JOHN T. ESQ.
BARLEY, SNYDER, COOPER & BARBER,
FULTON BANK**

(D.C. Civil Action No. 89-02871)

ORDER SUR PETITION FOR PANEL REHEARING

Present: **MANSMANN, COWEN and HIGGINBOTHAM,**
Circuit Judges.

The petition for rehearing filed by Sharon Krank, in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

* Honorable A. Leon Higginbotham, Jr., was Chief Judge at the time the original judgment order was filed on October 17, 1990, having assumed Senior Judge status on February 1, 1991.

Appendix C

BY THE COURT,

|

s/ A. Leon Higginbotham
Circuit Judge

